

IP 05-0392-M 1 KPF US v Vandever
Magistrate Kennard P. Foster

Signed on 10/31/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP 05-0392M-01
DAMON VANDEVER,)	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a three-count criminal complaint issued on October 7, 2005, with conspiracy to possess with intent to distribute and/or distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(ii), and 846; possession with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(ii); and , possession of a firearm by a convicted felon, in violation of Title 18 U.S.C. §922(g)(1). On October 13, 2005, at the initial appearance, the government moved for detention pursuant to Title 18 U.S.C. §§3142(e), (f)(1)(b), (f)(1)©), and (f)(2)(A) on the grounds that the defendant is charged with an offense for which the maximum sentence is life imprisonment, a drug trafficking offense where the maximum term of imprisonment of ten years or more is prescribed in the Controlled

Substances Act, and the defendant is a serious risk of flight, if released. The detention hearing was held on October 18, 2005. The United States appeared by Barry D. Glickman, Assistant United States Attorney. Mr. Vandever appeared in person and by his retained counsel, Kevin McShane.

At the preliminary hearing, the Government rested on the complaint and tendered Indianapolis Police Department Detective Clifton Jones for cross examination. Counsel for the defendant cross examined Detective Jones on all issues before the Court. The defendant presented no additional evidence and submitted on the issue of probable cause. Consequently, the Court found that the evidence constituted probable cause to believe that the defendant committed the crimes of conspiracy to possess with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, and possession with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine as charged in the complaint.

With respect to the charge of unlawful possession of a firearm by a convicted felon, the government concedes that the PS3 indicates that the defendant does not have a felony conviction. As a result, the Court finds that there is no probable cause to believe that the defendant committed the crime of unlawful possession of a firearm by a convicted felon. The Court does, however, *sua sponte* find that probable cause exists that the defendant committed the crime of possession of a firearm in relation to a drug trafficking crime, in violation of Title 18 U.S.C. §924(c)(1).

The probable cause finding gave rise to the presumptions that there is no condition or combination of conditions which will reasonably assure the appearance of the defendant or the safety of the community. The defendant did not rebut either the presumption that he is a

danger to the community or the presumption that he is a risk of flight and, consequently, was ordered detained.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. The defendant, Damon Vandever is charged in a criminal complaint issued on issued on October 7, 2005, with conspiracy to possess with intent to distribute and/or distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), 841(b)(1)(A)(ii), and 846; possession with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(ii); and , possession of a firearm by a convicted felon, in violation of Title 18 U.S.C. §922(g)(1).

2. The penalty for conspiracy to possess with intent to distribute and/or distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1) and 846, and possession with intent to distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II, Narcotic Controlled Substance, in violation of Title 21 U.S.C. §§841(a)(1), is a mandatory minimum sentence of ten (10) years and a maximum of life imprisonment.. Title 21 U.S.C. § 841(b)(1)(A)(ii).

3. The Court takes judicial notice of the criminal complaint in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. At the preliminary hearing, the government submitted the matter on the complaint. Counsel for the defendant called Detective Clifton Jones, Indianapolis Police Department, as a

witness and examined him on all issues before the Court. Counsel for the defendant presented no additional evidence.

5. The Court finds there is probable cause for the drug offenses the defendant is charged with in the complaint, and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. Title 18 U.S.C. § 3142(e).

6. The Court further finds that there is no probable cause to believe that the defendant committed the crime of unlawful possession of a firearm by a convicted felon. The Court does, however, *sua sponte* find that probable cause exists that the defendant committed the crime of possession of a firearm in relation to a drug trafficking crime, in violation of Title 18 U.S.C. §924©(1).

7. The Court admitted a Pre-Trial Services Report (PS3) regarding Mr. Vandever on the issue of his release or detention. Mr. Vandever is age 36 (DOB 5-20-69). The PS3 contains the defendant's criminal history and indicates the following:

(A) On March 15, 1988, he was convicted of Driving With a Suspended License in Marion County, Indiana and was fined.

(B) On February 8, 1994, he was convicted of Possession of Cocaine, a Class D Felony in Marion County, Indiana. He was sentenced to 547 days jail (suspended) and was placed on probation for a term of 365 days. On September 13, 1994, his conviction was modified to a Class A Misdemeanor.

8. The defendant has failed to rebut the presumption that he is a serious risk of flight, and a danger to the community and any other person. Therefore, Damon Vandever is ORDERED DETAINED.

9. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, Title 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, §3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. Title 18 U.S.C. §3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to §3142(f)(1)(B)(C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of §3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. Title 18 U.S.C. §3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination of conditions which would *guarantee* the defendant’s appearance or the safety

of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

10. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendants' appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, Title 21 U.S.C. §801 *et seq.*; the Controlled Substances Import and Export Act, Title 21 U.S.C. §951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. §1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) Title 18 U.S.C. §924©); (3) Title 18 U.S.C. §956(a); or (4) Title 18 U.S.C. §2332b. Title 18 U.S.C. §3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a §3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

11. If Mr. Vandever had rebutted the presumptions, the Court would consider the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

- a. On September 15, 2005, Indianapolis Police Department Narcotics Detective Clifton Jones was contacted by a confidential informant (CI). The CI told Detective Jones that Jeffrey OWENS was selling large quantities of cocaine. The confidential informant placed telephone call to OWENS in which OWENS agreed to supply the CI with four and one-half ounces of cocaine.
- b. At approximately 5:00 p.m., Detective Jones and assisting detectives, who were conducting surveillance at OWENS residence located at 5842 Annapolis Drive, Indianapolis, Indiana, observed OWENS leave the residence. OWENS was seen driving a gray and white Ford truck, bearing Indiana registration 554223L. Detectives followed OWENS to DAMON VANDEVER'S residence located at 340 Blue Ridge

Road, Indianapolis, Indiana. Detective Michael Vitali observed OWENS enter VANDEVER'S residence at 340 Blue Ridge Road, Indianapolis, Indiana and remain inside for approximately five minutes. OWENS left the residence and was followed from the area by Detective Jones and assisting detectives.

c. While following OWENS from the area, at approximately 6:15 p.m. OWENS was observed by law enforcement as he failed to stop for the stop sign at the intersection of North 42nd Street and West Hampton Road. Officer Ball also observed as OWENS traveled northbound on North Michigan Road and drive left of the center line on two separate occasions. Consequently, Officer Ball conducted a traffic stop on OWENS' truck in the 7300 block North Michigan Road.

d. Officer Ball approached the vehicle and made contact with OWENS. While Officer Ball was at the door of the Ford truck, Officer Ball observed OWENS place an unknown object down the front of OWENS' pants. OWENS consented to a search of his person and was asked to step from the vehicle. Officer Ball saw the unknown object pointing through the front of OWENS' pants and, when asked, OWENS told Officer Ball the object was cocaine. Officer Ball retrieved a clear plastic bag from the front of OWENS' pants. The plastic bag contained a white powdery substance. A subsequent test of the white powdery substance revealed the substance tested positive for the presence of cocaine with a total weight of 124.85 grams.

e. Officer Ball advised OWENS of his Miranda warnings to which OWENS said he understood. During questioning, OWENS admitted OWENS had four ounces of cocaine hidden in the front of his pants. Detective Jones and Detective Jeremy Ingram arrived at the scene. OWENS was again advised of his Miranda warnings. During

questioning by Detectives Jones and Ingram, OWENS said he had just picked up the cocaine and was transporting the cocaine for a friend.

f. On September 15, 2005, Detective Jones presented Marion County Magistrate Judge John Alt with an affidavit in support of a search warrant for the residence located at 340 Blue Ridge Road, Indianapolis, Indiana. Judge Alt reviewed the affidavit, determined probable cause existed, and accordingly, issued the search warrant.

g. At approximately 9:40 p.m., Detectives from the Indianapolis Police Department executed the search warrant for narcotics at VANDEVER'S residence located at 340 Blue Ridge Road, Indianapolis, Indiana. During a search of the residence, a suitcase was located in the basement crawl space. Ten (10) large brick shaped objects, wrapped in clear plastic and black tape were found inside the suitcase. Each of the blocks contained a white powdery substance. Two (2) large brick shaped objects, wrapped in clear plastic and black tape were found inside a closet under the basement stairs. Each of the blocks contained a white powdery substance. A subsequent chemical analysis of the white powdery substance revealed the substance contained cocaine and had a total weight of 12,002 grams (12.002 kilograms). An additional amount of cocaine (120.54 grams) was found inside the closet under the basement stairs and in the master bedroom closet. During the continuing search of the residence a Rohm .22 caliber handgun, serial number 40612, and a Johnson .38 caliber handgun, serial number 29585, were found inside a safe in the basement. A digital scale, that had white residue on it that subsequently tested positive for the presence of cocaine, was located in a cabinet in the kitchen. Documents, clothing, mail and personal belongings located in the residence identified VANDEVER as the resident of 340 Blue Ridge Road.

- h. The evidence demonstrates a strong probability of conviction.
- i. The fact that the defendant has a prior conviction for a drug offense demonstrates the dangerousness of the defendant.

The Court having weighed the evidence regarding the factors found in Title 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that even though the defendant has rebutted one of the presumptions in favor of detention, he nevertheless, should be detained, because he is a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, Damon Vandever is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this day of , 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

Distribution:

Barry D. Glickman
Assistant U. S. Attorney
10 W. Market Street - Suite 2100
Indianapolis, Indiana 46204

Kevin McShane
Attorney at Law
235 N. Delaware Street
Indianapolis, Indiana 46204

U. S. Probation, Pre-Trial Services

U. S. Marshal Service